IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 21, 2009 Session

STATE OF TENNESSEE v. GARY SCHWENDIMANN

Appeal from the Circuit Court for Lewis County
No. 6587 Jeffrey S. Bivins, Judge

No. M2008-01879-CCA-R3-CD - Filed March 11, 2010

When a city worker was changing the water meter at Appellant's home, he discovered a second meter buried about two feet underground with two bypass pipes attached to the main water line. These two bypass pipes were installed in such a manner so that water coming to those two pipes would not be registered by Appellant's water meter as water consumption. The Lewis County Grand Jury indicted Appellant for one count of theft of services over $1,000. This charge was later amended to theft of services of $500 or less. After a jury trial, Appellant was convicted of theft of services of $500 or less, a Class A misdemeanor. Following a separate sentencing hearing, Appellant was sentenced to eleven months and twenty-nine days. He was ordered to serve five days in jail, five days on house arrest, and the remainder on probation. Appellant now appeals, arguing that the evidence is insufficient to support his conviction and that the State violated his due process rights by failing to turn over exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963). After a thorough review of the record, we conclude that the evidence was sufficient and that there was no violation of the rules as set out in *Brady*. Therefore, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Donald W. Schwendimann, Hohenwald, Tennessee, for the appellant, Gary Schwendimann.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Ron Davis, District Attorney General, and Jeff Long, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Harold Ashworth formerly worked for the City of Hohenwald as a utility worker installing gas and water lines as well as repairing water leaks. In 2004, the city was in the process of changing out the water meters for their water company customers. In June or July of 2004, Mr. Ashworth went to Appellant's residence to change out the city water meter. He found the city meter and began to change out the old flange which connected the city meter to the water pipe. When he began to loosen the flange, the pipe came loose from the city's meter. Mr. Ashworth shut the water off running to Appellant's property. He dug a hole around the city's meter and found another meter box about two feet below the city's meter box. Mr. Ashworth explained that typically the city ran a water line to a meter from a larger water line at the road. The individual was then able to run a water line from the location of the city meter to their house to get water to their residence. The water lines running from the street to Appellant's residence were arranged in such a fashion.

When Mr. Ashworth discovered the meter box that was underground he took off the lid of the box. The meter box that was two feet underground was not installed by the city. Inside the meter box he found two bypass taps on the city side of the water line behind Appellant's city meter. In other words, the meter box contained taps to provide water before it could be registered by the city meter. The taps in the underground meter box were copper fittings to water lines coming off of the main plastic pipe from the main water line. Mr. Ashworth stated that someone could get water from the main line to their residence without the meter registering it because the copper fittings were before the meter. Mr. Ashworth shut the taps off that were in the underground meter box. Mr. Ashworth called Mark Graves who worked for the water department. On cross-examination, Mr Ashworth admitted that he did not trace the pipes coming from the underground meter box to see where they went.

Chuck Boshears worked for the City of Hohenwald from 2000 to 2002. He received a work order during that time to work on a water leak at Appellant's residence. When he arrived he found Appellant and another gentleman. Mr. Boshears changed out the water meter because the bottom of the meter was leaking. Appellant told Mr. Boshears not to dig on the left side of the meter because he had some pipes there. Appellant and the other gentleman left together.

Connie Stanley is a utility billing clerk for the City of Hohenwald. She has worked for the city for thirty-seven years. She keeps all the paperwork for the water department and sends the bills. Ms. Stanley also keeps the work orders with regard to water leaks. Appellant has had city water service since 1985 or 1986. Appellant reported that he had water leaks

in February of 2001 and in October of 2002. In October of 2002, Appellant was billed for 158,200 gallons of water. The bill was $304.64. The bill was adjusted to $54.45. After October 2002, there was no water consumption at Appellant's residence for twenty-two months. For these months, Appellant was billed the minimum bill, $14.81, which is the amount billed for consumption of zero gallons to 1,000 gallons. From November 2002 to August 2004, Appellant's water bill totaled $333.88. For the twenty-two month period prior to that, his water bill totaled $783.57. For the twenty-two month period after that his total water bill was $1,045.91. After adjustment for a rate increase, the twenty-two month period after the period in question equalled $782.32, instead of $1,045.91. There was an increase in water rates during that time. In November of 2002, Ms. Stanley generated a work order to determine whether Appellant's meter was "stopped up." However, she never received a work order back signaling that a worker had checked the meter as requested by the work order.

Bob Johnston is the county property assessor for Lewis County. Records from his office show the Appellant's property consisted of 13.5 acres. Appellant owns a two-story, 5210-square-foot home. Appellant also has a 20 by 40 foot swimming pool on the property.

Bambi Cooper is employed at Liberty Pharmacy. She worked there with Appellant from 1998 until 2004, when Appellant left the pharmacy. While they worked together, she and Appellant had a discussion regarding his desire to install an irrigation system. He asked Ms. Cooper to call Prince's Hardware, where she was previously employed, to check on prices for plumbing pipes and fittings. She called the hardware store for him and got a contractor's price arranged for Appellant's purchase. Appellant purchased pipes and fittings for an irrigation system. She knew the order was for a large amount of pipes. None of the items Appellant purchased from the hardware store were illegal.

Larry Prince has owned Prince's Hardware for about thirty years. He knows Ms. Cooper from when she worked for him and from seeing her at the pharmacy. Mr. Prince knows Appellant from seeing him at the pharmacy. Mr. Prince recalled that Appellant had purchased some reducer bushings to reduce the size of the pipe to the sprinkler heads. Mr. Prince's son also works at the hardware store. Mr. Prince recalled that Ms. Cooper either ordered supplies for Appellant at some point or that Appellant ordered them for himself.

Mark Truett works in the maintenance department for the Town of Centerville. He has worked in the maintenance department for about twelve years where he works on water, sewer, and gas line maintenance. His supervisor was Mr. Steve Bowen. He knows Appellant through the pharmacy and Appellant's friendship with Mr. Bowen. Mr. Truett went to Appellant's residence on two occasions. The first was to fix a water leak, and the second was to bring a trencher, owned by the Town of Centerville, to Appellant's property. A

trencher is used to dig a ditch in which an individual plans to put a pipe. Mr. Truett delivered the trencher with a city dump truck and trailer. He did not stay with the equipment but rather unloaded it and left. Mr. Bowen told Mr. Truett to bring the trencher to Appellant's house, and the city paid him for the time Mr. Truett spent in delivering the trencher.

Danny Hudgins is also employed by the Town of Centerville in the maintenance department. Mr. Bowen was also his supervisor. He was told by Mr. Bowen to deliver a city-owned trencher to Appellant's residence on a Friday afternoon, leave it, and go back and get it on Sunday afternoon or Monday morning. He delivered the trencher with a city-owned truck. Mr. Bowen told Mr. Hudgins to cut through a back road to get to Appellant's house. Mr. Hudgins had previously been to Appellant's residence to fix a water leak.

Charles Pierce works for the Centerville Police Department. He knows both Mr. Bowen and Appellant. Mr. Pierce's mother worked at the pharmacy with Appellant. He recalled having a conversation with Appellant about his irrigation system. Appellant told Mr. Pierce that he had drilled a well and installed an irrigation system to water his yard. However, the well was not furnishing enough flow to irrigate Appellant's whole yard. Mr. Pierce also heard conversation regarding the irrigation system between Appellant and Mr. Bowen. While they were talking, they determined that the only solution was to tap into the city's water line to furnish enough flow. Appellant told Mr. Pierce that he had someone who worked for him who was capable of tapping into the city water line.

Gypsy Jo Schwendimann, Appellant's wife, testified on Appellant's behalf. She and Appellant have lived in their home for twenty-one years. She has worked at V & W Ready Mix Concrete since 1987. At V & W Concrete, Mrs. Schwendimann manages the office, issues checks, deals with accounts payable, and manages the financial statements of the company. She also is responsible for the household bills and checkbook for herself and her husband. Mrs. Schwendimann estimated that she wrote in excess of 300 checks in a month between her job and her private household expenses. Her water bill is paid as part of a larger utility bill. She reviewed her utility bills for the time period from October 2002 to August 2004. She never realized she was paying the minimum water bill for these months. She was alerted in May or June of 2004 that they were not being billed properly for water.

Before October 2002, the Schwendimanns had problems with their water bill. Between the time they moved into the house through 2002, Mrs. Schwendimann estimated that they had had ten to fifteen water leaks. She blamed the leaks on the fact that there was road construction in front of their house for about eight years. As a result, their waterlines contained a great deal of mud and the water was turned off and on a great deal. If a leak occurred, she contacted the city. In addition, the meter reader often informed her if he noticed a potential problem from the meter. She never demanded an adjustment to her bill,

but when the city was informed of a leak, her bill was adjusted. From October 2002 to August 2004, the city never called about the water bill being for the minimum amount.

In September 2002, there was a water leak near the meter. The family had gotten up early to go to church, and Mrs. Schwendimann found that they had hardly any water pressure in the bathroom. When the Schwendimanns left the house, they saw water shooting out of the ground about three feet high near the meter. She contacted the city but not immediately. The city dug around the meter and fixed the problem. She did not know what the workers did to fix it.

Jimmy Willcutt knows Appellant because Mr. Willcutt's wife cleans for him. He had done plumbing work for Appellant in the past. He denied that Appellant had ever asked him to tap into the city's water line. Howard Gay also works for Appellant by doing general yard maintenance. He also denied that Appellant had ever asked him to tap into the city's water line.

In January 2005, the Lewis County Grand Jury indicted Appellant for one count of theft of services over $1,000, a Class D felony. On August 22, 2007, the trial court held a jury trial. At the conclusion of the trial, the jury found Appellant guilty of theft of services of $500 or less. On October 11, 2007, the trial court held a separate sentencing hearing. The trial court sentenced Appellant to eleven months and twenty-nine days. The trial court ordered Appellant to serve five days in the county jail and five days under house arrest. The remainder of his sentence was to be served on probation with a requirement of one hundred hours of community service.

Appellant filed a timely notice of appeal.

ANALYSIS

Sufficiency of the Evidence

Appellant first argues that the evidence was insufficient to support his conviction. The State argues that the evidence is sufficient. Appellant's argument that the evidence was insufficient focuses on statements made by the prosecutor during his closing argument. We intially point out that arguments made by counsel are not considered evidence. Therefore, we restrict our review to the evidence presented at trial.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses

and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the state "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). Of course, a criminal offense may be established exclusively by circumstantial evidence. *State v. Tharpe*, 726 S.W.2d 896, 900 (Tenn.1987); *State v. Jones*, 901 S.W.2d 393, 396 (Tenn. Crim. App. 1995). However, the trier of fact must be able to "determine from the proof that all other reasonable theories except that of guilt are excluded . . . ." *Jones*, 901 S.W.2d at 396; *see also, e.g.*, *Tharpe*, 726 S.W.2d at 900. We may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779.

Appellant was convicted of one count of theft of services found at Tennessee Code Annotated section 39-14-104. As indicted, he was convicted under Tennessee Code Annotated section 39-14-104(1), which states, "A person commits theft of services who: (1) [I]ntentionally obtains services by deception, fraud, coercion, false pretenses or any other means to avoid payment for the services; . . . ."

When taken in a light most favorable to the State, the evidence shows that the city was called to fix a significant leak located at Appellant's water meter in September 2004. Immediately thereafter, Appellant's water usage, according to the water department's city-installed meter, droped to zero. About twenty-two months later, when the city was replacing water meters, the city worker discovered a second meter box buried about two feet underground with two taps into the city water line that were placed before Appellant's water meter. The water flowing into the two taps is not registered by the city-installed water meter upon which the city relies to determine Appellant's water bill. The first month after the two taps were removed, Appellant's water usage according to the city-installed water meter returned to levels before the significant leak.

Also during this time period, other individuals heard Appellant discuss the fact that the well he dug for his irrigation system did not pull enough water for the system. Appellant purchased a large order of pipes and fittings. Two workers from the Town of Centerville also delivered a trencher to Appellant's house apparentlyfor personal use.

Based upon the evidence presented at trial, we conclude that a reasonable trier of fact could determine that Appellant either installed the two taps or had them installed by another individual. The installation of the two taps in the underground water meter while the city-installed meter remained would allow Appellant to benefit from the city's water service without paying for it. The evidence presented for the months before November 2002 and the months after August 2004 shows that Appellant's water bill total for those twenty-two month periods was $783.57 and $782.32 (after rate adjustment), respectively. From November 2002 to August 2004, Appellant's water bill total was $333.88. The difference between the amounts is less than $500, as required for a Class A misdemeanor under Tennessee Code Annotated section 39-14-104. Giving the State the benefit of all reasonable and legitimate inferences from the evidence in the light most favorable to the State, as we are required to do, the evidence is sufficient to support the verdict.

Brady Material

Appellant's second argument is that the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194 (1963), when it failed to turn over exculpatory evidence before trial, namely a report by Steve Holloway. The State argues that Appellant had waived this issue for failure to include it in his motion for new trial or make a contemporaneous objection.

At the sentencing hearing, the State presented the pre-sentence investigation report. As part of that report, the State included statements generated by officers who interviewed Mr. Hudgins, Mr. Pierce, and Mr. Holloway. Appellant objected to the entry of Mr. Hudgins's and Mr. Holloway's statements because they were unreliable hearsay. The trial court ruled that Mr. Hudgins has testified at trial and the court would rely on the testimony elicited at trial for sentencing purposes. As for Mr. Holloway's statement, the trial court stated that the report did not "particularly add[ ] or subtract[ ] anything from the court's mind, so for that reason, then, the court will say it will not consider the recitation of Mr. Holloway's statement contained in the report." Appellant included this issue in a motion for new trial dated November 9, 2007.

The State also argues that Appellant did not contemporaneously object to Mr. Holloway's statement. However, this characterization is not entirely accurate. Appellant did

object to the statement, but for reasons other than a *Brady* violation. At the sentencing hearing, Appellant objected to the trial court's consideration of Mr. Holloway's statement because it was unreliable hearsay and should not be admitted into the sentencing hearing. But now Appellant argues that the evidence is so favorable to him that its being kept from him violated his due process rights. It is well-established in this State that a party may not take one position regarding an issue in the trial court, change its strategy or theory in midstream, and advocate a different ground or reason in this Court. *See State v. Aucoin*, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988), *cert. denied*, 489 U.S. 1084, 109 S.Ct. 1541(1989); *State v. Dobbins*, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988).

Regardless of the fact that Appellant changed his tactics from trial to his appeal, he would be unsuccessful on this issue. In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In order to establish a due process violation under *Brady*, four prerequisites must be met:

> 1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information, whether requested or not);
>
> 2. The State must have suppressed the information;
>
> 3. The information must have been favorable to the accused; and
>
> 4. The information must have been material.

State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). *Brady* does not require the prosecution "to disclose information that the accused already possesses or is able to obtain." *State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992). The burden of proving a Brady violation rests with the defendant, and the violation must be proven by a preponderance of the evidence. *Edgin*, 902 S.W.2d at 389.

This Court has stated that in order to establish a *Brady* violation, the information need not be admissible, only favorable to the defendant. *See State v. Spurlock*, 874 S.W.2d 602, 609 (Tenn. Crim. App. 1993). Favorable evidence includes evidence that "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's

version of the events, or challenges the credibility of a key prosecution witness." *Johnson v. State*, 38 S.W.3d 52, 56-57 (Tenn. 2001) (quoting *Commonwealth v. Ellison*, 379 N.E.2d 560, 571 (Mass. 1978)). This Court will deem evidence material if a reasonable probability exists that the result of the proceeding would have been different had the evidence been disclosed. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375 (1985). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* at 682 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052 (1984)).

We have reviewed the statement in question. Appellant argues that Mr. Holloway's statement that the City of Hohenwald routinely installs bypasses of water meters is exculpatory. However, when reviewing the statement in its entirety, we find that the statement cannot be construed as exculpatory. After being shown a diagram of the bypass installed at Appellant's property, Mr. Holloway stated that the bypass was installed without knowing that the city had already installed a bypass. In other words, the bypass in question, "bypassed the bypass." In addition, he pointed out that the copper pipes used for the bypass in question were not used by the city because of the rate of deterioration. In addition, Mr. Holloway specifically stated that he did not install a bypass at Appellant's home and never would because "he particularly does not like [Appellant]." This evidence is clearly not favorable to Appellant. There is not a reasonable probability that the outcome of the trial would have been different had this evidence been disclosed prior to trial.

Therefore, this issue is without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

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JERRY L. SMITH, JUDGE